JUDICIAL DECISIONS

UPON

THE CASES OF HABEAS CORPUS,

BROUGHT BY

THE LATE OFFICERS

OF THE

BANK OF THE UNITED STATES.

PHILADELPHIA.
J. PERRY, PR. S. E. COR. SECOND AND MARKET STS.
.....
1842.

OPINION

OF THE

COURT OF GENERAL SESSIONS,

IN THE CASE OF

NICHOLAS BIDDLE AND OTHERS, vs. HENRY MORRIS.

(Of March Term, 1842.)

Commonwealth of Pennsylvania, ex relatione N. Biddle *vs.* Henry Morris, Esq. Sheriff of the City and County of Philadelphia. } *Hab. Corpus.*

Commonwealth of Pennsylvania, ex. rel. Joseph Cowperthwaite, *vs.* the same. } *Hab. Corpus.*

Commonwealth of Pennsylvania, ex rel. John Andrews, *vs.* the same, } *Hab. Corpus.*

THESE parties were bound over in January last, to the present term of this Court, to answer a charge of having conspired to cheat and defraud the stockholders of the Bank of the United States. Having severally obtained writs of Habeas Corpus from the Court of Common Pleas, they were remanded here under the sixth section of the Habeas Corpus act of 1785, the writ having issued within fifteen days before the March Term of this Court. An application to be heard under the *same* writs, originally taken to the Court of Common Pleas, was refused; new writs were then issued, under which each party claimed the right of a separate hearing. This application was also refused; partly from regard to economy of time, but principally for reasons referring to the *joint nature* of the offence charged. Two other parties, originally bound over with these, upon the same hearing, were discharged in February, by one of the Judges of the Court of Common Pleas, under writs of Habeas Corpus, issued in due season.

The hearing of this case has been protracted, from the circumstance that the parties—prosecution as well as defendants—have treated it under certain heads, very much as if it were a civil proceeding, to settle contested pecuniary questions between the Bank of the United States and its late officers, rather than as a criminal prosecution. The case, also, having been submitted by the counsel without argument or the citation of any authorities, a degree of labour has thus devolved upon the Court, which might otherwise have been probably spared.

The transactions which this proceeding embraces, extend from the year 1835, to some time in 1840. The present Bank of the United States, was incorporated on the 18th of February, 1836. Nicholas Biddle was elected its president, and so continued till the 29th March, 1839, when he resigned. He had resigned the presidency of the old Bank on the 1st of March, 1836—the two Banks being organized with distinct boards of directors. John Andrews, who had been first assistant cashier of the old Bank, from the 1st of January 1836, was, upon the resignation of Samuel Jaudon, elected cashier, which office he held until June, 1840. Joseph Cowperthwaite, who was second Assistant Cashier of the old Bank, from the 1st of January, 1835, was, upon the resignation of Samuel Jaudon, on the 22d of September, 1837, elected Cashier, which office he held until June, 1840.

The allegations of the Commonwealth against these parties may be classed under the following heads:

1st. In respect to certain loans, or pretended loans. This head does not affect Nicholas Biddle, but concerns only Joseph Cowperthwaite and John Andrews.

2. In respect to certain advancements to Nicholas Biddle and Joseph Cowperthwaite, on shipments of merchandize to Europe. Under this head John Andrews is not included.

3. In respect to moneys paid on certain receipts, the application of which, the prosecution alleges, is not specified in any vouchers, or upon the books of the Bank. Under the principal sub-division of this head, John Andrews is the party mainly, if not solely, implicated.

A few preliminary remarks may serve to facilitate the particular investigations which each of these several heads embraces.

In order that the relators shall be remanded into custody or held to bail, it is indispensable that the prosecution shall have established "probable cause" for imputing to them a concerted design to injure the Bank of the United States by false or corrupt means; or to benefit themselves by measures of an illegal character. Independently of the *corrupt motives* of the acts which have been given in evidence, nothing is alleged which can be properly defined as *in itself* illegal. The word "illegal" is thus, of course, employed with reference to the *Criminal* law upon this subject, as it may be understood to be now settled.

The doctrine of prosecution for *conspiracy* has, during the present century, been extensively considerd both in this country and in England. The mere circumstance of two or more persons joining in an act which might be made the subject of a civil action, does not necessarily render it an act indictable and punishable as a conspiracy. Were it so, an indictment could then be found for every misrepresentation made by partners in trade as to the quality of their wares; and the purchaser, who could not be a witness in a civil action as to the deceptions complained of, could thus easily effect his own purposes,—possibly those of extortion or vindictiveness,—by transforming his civil remedy into a criminal prosecution. The law upon this subject is well, and has been

long, settled. Two leading cases are those of the *King vs. Pywell and others*, (Starkies' N. P. C. 402,) and the *King vs. Turner and seven others*, (13th East. R. 228.) In the first named case, the defendants were indicted for having conspired to cheat and defraud General Maclean by selling him an unsound horse. Pywell sold the horse, warranting its soundness; another defendant, representing himself to be Pywell's agent, stated that he knew the horse well, and also warranted it sound. The unsoundness of the horse being discovered soon after the sale, the prosecution for the conspiracy was instituted. But Lord Ellenborough held that the case did not assume the shape of a conspiracy; that, if it were to be considered an indictable offence, then, instead of the actions which had been brought on *warranties*, the defendants ought to have been indicted as cheats; and no indictment in a case like this could be maintained "*without evidence of concert between the parties to effectuate a fraud.*" The point adjudged in the latter case also deserves notice. Eight poachers had been tried for a conspiracy to enter into a preserve for hares, and forcibly resist such persons as might oppose them in the execution of their purpose. Having been convicted, it was moved to arrest the judgment for the insufficiency of the charge, &c. The motion prevailed—Lord Ellenborough, Chief Justice, observing: "I should be sorry that the cases of conspiracy against individuals, which have gone far enough, should be pushed still farther. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground—in other words to commit a civil trespass—should be thereby in peril of an indictment for an offence which would subject them to infamous punishments."

That the acts of these relators, if done with an intent to defraud the stockholders of the bank, would be indictable, may be considered as established by the decision of the Court of Appeals of Maryland, in the case of the *State vs. Buchanan and others*, (5th Harris and Johnson's R. 317;) though the contrary is supposed to have been decided in New Jersey, in the *State vs. Rickey*, (4th Halstead, 293.) The former case, (in which the parties were officers in one of the branches of the late bank of the United States,) was an indictment for a conspiracy, *falsely*, &c. by wrongful and indirect means to cheat and defraud the Bank. The motive imputed was essential to the validity of the indictment. The indictment was held by the Court to be sufficient in form; but the defendants were afterwards acquitted, because of the insufficiency of the proofs.

It is well observed by Judge Jones, in the case of the *Commonwealth vs. Ridgway*, (2d Ashmead, 259,) that "the Law of Conspiracy is involved in great confusion. Interpreted by some English writers, it seems to create a mysterious crime, which a tribunal before whom a citizen is accused, when two or more persons are implicated, may mould out of actions otherwise the most innocent. This interpretation I consider wholly inadmissible on any authority short of that of the most direct and positive." "Happily these writers are not fully supported by the cases they cite, and are contradicted by equally good authorities."

The confusion of which Judge Jones so justly complains, arises from the innovations which modern days have made upon the more ancient Law of Conspiracy. Lord Coke confined the offence within very narrow limits. He held a conspiracy to be (*3d Institutes*, 43,) "a consultation or agreement between two or more, to indict an innocent person falsely and maliciously, whom, accordingly, they cause to be indicted or appealed; and, afterwards, the party is lawfully acquitted by the verdict of twelve men." This definition appears to be based upon the *Statute of 21st Edward* 1st; but Sergeant Hawkins, (1 *Pleas of the Crown, Book 1st, Chap. 27th,*) questions the accuracy of so much of Lord Coke's description of conspiracy as requires the acquittal of the party grieved, to make the offenders guilty. The policy of the later Criminal Law has wisely extended Lord Coke's doctrine of conspiracy; though, unfortunately, the tendency has been to rush to the opposite extreme: and the regret expressed by Lord Ellenborough, in a case already cited, "that the cases of conspiracy against individuals, which had been pushed far enough, should be pushed still farther," must be shared in by all Judges who have opportunities of witnessing the almost daily perversion, by means of this apparently illimitable offence, of Courts of criminal jurisdiction into forums for the redress of civil wrongs. In New York these mal-practices of litigation are in a great measure prevented, by the enactment of a *statute* which *defines* the offence of Conspiracy, divides it into six distinct heads, and provides that no conspiracies other than those thus enumerated, shall be the subjects of an indictment. (*2d Revised Statutes, Title Misdemeanors, Section 8th.*) The passage of a similar Law in Pennsylvania, could not but be productive of great public benefit, and would not only apprise defendants of their rights, but prosecutors of their extent of remedy—upon which latter doctrine, a most latitudinarian construction, in reference to criminal proceedings, at present prevails. In the absence, however, of a *statute* similar to that which obtains in New York, we are thrown upon the *common law* for the definition of conspiracy; and, for convenience, adopt that given by Judge Randall, in the case of the *Commonwealth on the Relation of Jaudon vs. Wertheyme.*

"1st. An agreement by two or more persons to commit a *criminal act;* and in this case the *means* by which the act is to be committed, is immaterial.

2d. An agreement to commit an act not *criminal in itself*, but to be accomplished by *criminal means;* and there must be a direct intention that injury shall result from it; or the object must be to benefit the conspirators to the prejudice of the public, or the oppression of individuals."

It is believed that all the authorities are reconcilable with this twofold definition, under the second head of which the present cases fall. In the case of the *Commonwealth vs. Ridgeway*, (2 Ashm. 257) Judge King, President of the Court of Common Pleas, says: "The vital principle of this charge (conspiracy) is the *fraudulent and corrupt*

combination between the alleged confederates in crime ; and this combination the Commonwealth must *prove*, either by direct evidence, or through the exhibition of such circumstances as necessarily tend to its establishment." He adds, that "such a crime is not to be charged on any man from vague circumstances, strained presumption, or jealous surmises." In each of the cases last cited, the proceeding was on habeas corpus, at the instance of the party charged with conspiracy.

From the authorities mentioned, it results that these relators should be remanded or held to bail, if, under any one of the three heads of prosecution, the evidence has established : *first*, an evil motive or design to defraud the Stockholders of the Bank of the United States, and, in the *second* place, concert between these parties to effectuate such design by their combined action. It will not be necessary to discuss the question what extent or degree of combination is required, in order to bring a given case within the legal definition of conspiracy. There are authorities, (*Rogers vs. Hall*, 4th Watts, 359 ; *Gibbs vs. Neely*, 7th Watts, 305,) that the smallest degree of concert or collusion is sufficient for this purpose, where the motive is fraudulent. But the measurement of the degrees of an offence is to be considered only after a case has been brought within the definition of the offence itself. The doctrine just alluded to, is therefore confined to cases where the motive of each of the parties concerned is evil, and can be referred to the same object. Unless a concurrence in, and unity of, *evil design* is imputable, mere participation in an act not criminal in itself, is not identical with concert or combination. So essential are combination and unity of purpose to the success of any prosecution for this offence, that an indictment for conspiracy has always been held an exception to the rule of practice which, in other cases, admits of *separate* trials, "because," as Judge King observes, in the case of *Commonwealth vs. Manson*, (2d Ashmead, p. 31,) "it is in its nature *joint*, and cannot be severed." Indeed it was mainly upon this very ground that the application of these relators for separate hearings was resisted by the prosecution, and refused by the Court.

Of the three particular heads into which we have divided the charges of the prosecution, the first is that of certain loans, or pretended loans, to John Andrews and Joseph Cowperthwaite. Some of these loans were made to them separately—others to them and Samuel Jaudon. No question of conspiracy can arise in regard to the *separate* loans, because no *concert* of action can be imputed. The loans alleged to have been made to the three parties jointly, appear, upon investigation, not to have been, properly speaking, joint loans. They held certain securities in common, and each borrowed an equal amount on his separate account ; and to secure the three loans, they pledged the stock held by them in common. This was known to the Committee of Exchange, who authorized the loan in this form, as is proved by Mr. Bevan, one of the members of that Committee.—But, as the parties made their application together, it might be the subject of a prosecution for conspiracy, if a fraudulent motive were justly attributable to it, upon the evi-

dence. In what does the supposed fraudulent motive consist? This money formed a part of several millions of dollars lent out by the Committee of Exchange, under the authority of a vote of the Directors, passed at a time when the Bank was about to wind up its business, under the charter from Congress; and the Directors thought that they could not safely employ its capital for the ordinary business of banking. Similar loans were made under the charter from the State, induced by the prevailing impression that the capital of the Bank was larger than could be otherwise employed to advantage. The loans to these parties were made on pledges of stock; and appear to have been made on the credit of the securities deposited, rather than of the persons who received the money. Similar loans were made, indiscriminately, it would seem, to all persons who were desirous thus to borrow, upon similar securities. There is no proof of any unwillingness on the part of the Directors to accede to any application of the three Cashiers to become borrowers; or that the securities were deemed inadequate at the times when they were accepted.—Nor has the testimony raised the slightest reason to impute to these parties, at the time of borrowing the money, any intention of not returning it, and redeeming the securities pledged.

But the prosecution relies upon two circumstances: First, that these loans were unknown to the Directors; and, second, that a portion of them was subsequently liquidated by a transfer of certain stocks, at their par value, in payment *pro tanto* of the respective debts of the parties. As to the first of these alleged circumstances, the true and only inquiry is, not whether the loans were *unknown* to the Directors, but whether they were *concealed*, or purposely withheld, from their knowledge. In the endeavor to establish such a concealment, the prosecution has entirely failed. The witnesses for the Commonwealth, and the documents produced by them, have established rather the reverse.

It seems to have been assumed by the prosecution, that secrecy and concealment were to be established by proving the absence of any formal vote or act of the Directors, authorising these loans, recorded on the minutes; and that one or more Directors who have been examined have no present recollection of the circumstance. The singularly loose method in which the business of this corporation was conducted by its Directors, could not possibly furnish a more fallacious criterion than that here suggested for our adoption, as to the openness or concealment of this transaction. The Board of Directors, as a body in convention, seems to have looked only at results—leaving the details of business to a committee, who divided themselves into sub-committees, and acted, by way of oral communication, with the officers who carried their views into effect. These operations were seldom reported to the Board at the times of their occurrence, but they appeared on the face of the vouchers and tickets, by which they were transferred to appropriate heads of accounts on the books; and were thence transferred, semi-weekly, to a formal and regular balance sheet, called the "State of the Bank," laid before the Directors at each meeting. On this "State of the Bank" every Director had before him the rise and

decline of every one of the heads of the business of the bank. A recurrence from this to the Ledger would, in every case, have led to a reference to the ticket, which, in the accounts of this institution serves a purpose similar to that of a Journal entry in a private set of books; and, from these to such vouchers and subsidiary books and memoranda as might be useful for purposes of reference. Before the end of each half year the different heads of the balance sheet ought to have been, and, to a considerable extent, were, revised and examined by the different committees, and the result embodied in the report of the Dividend Committee on the half year's operations. This organization was deemed sufficient, and was satisfactory to the Directors, during the season of the prosperity of the institution. If it was defective, the fault lay not with the officers but with the Directors, who alone had the power to reform it. The difficulty of an actual participation, by the Board of Directors, in the current and daily details of an institution of such magnitude and widely extended concerns, may readily be conceived to have been most formidable, and it might have been fruitless to attempt it. It seems that, under the organization adopted and acted upon, the materials for the fullest and most detailed investigation were always accessible; and they must have been frequently resorted to, not alone by the Standing Committees, but by Special Committees, to an extent which would have rendered any attempt at concealment preposterous on the part of the officers. The ordinary scrutiny of the Standing Committees would have prevented such an endeavor from being made with any rational grounds to anticipate its success. But, to their supervision, must have been added that of numerous Special Committees. In 1836, and again, in 1839, all the funds, securities, and credits of the corporation were valued, in detail, by committees, whose proceedings it will be necessary to notice hereafter.

Under this organization of the government of the institution, the scope of the regular corporate action cannot be deemed to have been limited by the votes of the Board of Directors, and the knowledge or recollection of members of the board.—The law is settled that the corporate acts of a Bank, or other private corporation, do not consist in the votes of the Directors alone. All things done according to the established *routine* and *usages* of the business of the corporation, whether authorized by the by-laws, or recorded on the minutes, or on the face of the accounts, or among the vouchers and other papers filed, if sanctioned by the Directors, as to either their general or particular character, are acts of the corporation; and such sanction may be implied from the continual tacit acquiescence of the Directors, without objecting to, or rescinding, the acts in question, in proper season, as well as from proceedings of the most formal character. *Foster vs. the Essex Bank*, (17th Mass. R. 479,) and the *Dedham Bank vs. Chickering*, (3d Pick. R. 335,) bear directly upon this point; and the same question is decided in the case of the *Bank of the United States vs. Dandridge*, (12th Wheaton's R. 64,) in which the law is discussed at length by Judge Story. The case of *Gordon vs. Preston*, (1st Watts, 385,) is

a recognition of the doctrine, to the fullest extent, by the Supreme Court of Pennsylvania.

The loans in question were all carried to the head of "*Bills Receivable*," on the ledger of the Bank; and this head included, among other matters, all loans made otherwise than by formal discount at meetings of the Board. The particulars composing it were, after a certain date, kept in a book in the department of the First Assistant Cashier, who had charge of the securities for these loans. Before this book was kept, they were entered in memoranda on sheets of paper, which accompanied the securities. The amounts, in the mean time, always appeared regularly on the general ledger; and were thence carried, semi-weekly, into the "*State of the Bank*," which was laid before the Directors in the manner already explained. The same head was contained in the monthly statements transmitted, under the requisitions of the charter, to the Auditor General at Harrisburg. It was in these statements designated by the appropriate title of *Bills discounted on other than personal security*.

Some of the Directors have testified that they did not know of these loans to the officers of the bank; but these gentlemen do not appear to have known any more of the millions, under the same head, lent, through the Committee of Exchange, to numerous persons wholly unconnected with the bank, which, on the face of the "*State of the Bank*," and from the oral testimony, they were in the habit of lending, in the most open manner, to scores, perhaps hundreds of persons, without any more direct privity of the Board of Directors. The testimony does not approach, therefore, to the character of even *negative* evidence; and if it did, the *positive* testimony of Mr. Bevan would dispose of it. In the progress of this proceeding, a remarkable illustration was furnished of the insufficiency of such testimony as the foundation of any rational belief.

In the summer of 1836, a valuation was made of the property of the late Bank, with a view to a settlement with the government of its stock in that institution. In order to make this valuation, the materials of the balance sheet, or "State of the Bank," as it stood on the 3d of March, of that year, were dissected. To equalize the adjustment of outstanding interest, and interest on current discounts, an average amount of number of days was ascertained, and applied to the different heads comprising this balance sheet. Of each of the material heads, thus slightly varied in amount, a particular analysis or abstract was made, in a form adapted to the purpose in view. The head of "*Bills Receivable*," which is the only one here in question, was subdivided into eleven new and distinct heads, no one of which was specifically in the same form and amount on the books of the Bank. The same heads were again brought together, and the result re-stated, under an arrangement corresponding more nearly with that upon the "*State of the Bank*." This Report was subscribed by nine gentlemen, viz:—John Bohlen, *Caleb Cope*, Robert Ralston, Jr., Ambrose White, Richard Price, Matthew Newkirk, John Moss, Benjamin W. Richards and

Robert Toland. Three of these were Directors of the new Bank, three of the former Bank, and the other three independent persons, selected from the community at large. Mr. Joshua Lippincott, who was at the time a Director of the Bank, testifies that he was not aware that this Committee of Valuation examined these loans in detail. "But," he adds, "they must have examined them in detail, or they could not have made a valuation." Their Report was transmitted to the Secretary of the Treasury by the President of the Bank, with a declaration that all the materials on which it was founded would be submitted to any examination which he might desire to make. Three commissioners were appointed to make this examination. These commissioners had many conferences, and an extensive correspondence, with a subcommittee of the Committee of Valuation, composed of three of its members. In the course of this correspondence, the latter committee evince the most ample and particular knowledge of the character of the contents of the statement or report of the committee of nine, which they had before subscribed. The draft of two letters from them to the commissioners of the United States, is in the handwriting of Mr. Cope, who has been examined by the prosecution in this proceeding. But it now appears, from his testimony, that he either never knew of these loans, or that he has lost all recollection of them. It is unimportant which of these is the correct alternative. It would be alike unjust to visit the officers of the Bank with the evil consequences of a Director's contemporaneous inattention to details of which he ought to have been, and might have been, cognizant in the performance of his duty; or of his subsequent forgetfulness of what, after the lapse of six years, it would be very difficult to remember. In either alternative, we see the entire immateriality of this kind of evidence in a case where ignorance on the part of the Directors, if it really existed, cannot be attributed to any measures of concealment adopted for the purpose of eluding the vigilance which they, under all ordinary circumstances, should have exercised upon this subject.

As to the entries of March, 1838, in regard to the transfer of some of the stocks in part payment of the debts for which they had been pledged, it is to be observed that the entries of this transaction are openly made on the books, in the fullest manner: and that many semi-annual settlements of the Bank occurred afterwards, without any sort of complaint or objection being made by the Directors, or from any quarter. After several of these semi-annual settlements, a committee of the Directors, in 1839, investigated the whole subject of the assets, securities, and outstanding accounts of the Bank: and two of them (Lewis Waln and J. J. Vanderkemp) testify that, at this time, a book containing the accounts of *these very loans* was before them, and the accounts themselves were actually inspected by them. A similar investigation was made by a special committee, in 1840, after the relators had all quitted the service of the Bank, and after their accounts had been, under many heads, the subject of the severest scrutiny.

The reports of these committees, with a list of all the securities of

the Bank, in like manner as on the report of the Committee of Valuation of 1836, are spread at length upon the formal minutes of the Directors; yet none of these committees, or the Board, ever repudiated the transactions, or suggested that the credits were unauthorized, or disclaimed the title of the Bank to the stock transferred as its absolute property. From this acquiescence the presumption of a contemporaneous assent to the settlement is irresistible; and there is nothing in any part of the evidence by which it is rebutted. In all cases between a natural person or a corporation, and the agent by whom the business of either may be transacted, the negotiations between them must be considered as open until the principal or employer shall, expressly or by implication, have declared his acquiesence or dissent. Unless an act of an agent be in itself criminal,—independently of its actual object, or of the mutual relations of the parties to each other,—the acquieseence of the principal in the act, when it is made known to him, must operate *retrospectively*, and negative the idea of its having been done against the will of the employer. It is true that his release or waiver of his civil remedy can be no abandonment of the right of the public to prosecute a criminal offence involved in the same transaction. But the case before us rests on a different principle. The character of the act under consideration depends on the *motive;* and this case can be determined only by ascertaining whether it was done against the will, or with the assent of the Directors of the Corporation. Mr. Chitty, (1*st General Practice*, 29,) notices cases in the criminal law where the actual offence is destroyed by the party prosecuting having consented to its commission. An instance of the application of this doctrine occurred in the case of the *Commonwealth vs. Manley and Leach*, (12*th Pickering*, 173.) The defendants were charged with a conspiracy to defraud a married woman. The Court, after deciding that if a fraud had been practised or attempted upon any one, it was upon her husband, added: "If *he* assented to the acts of the defendant, or approves of them, no one else has a legal right to complain."

On the whole, we can find no *probable cause*, under the first division of the allegations of the prosecution, to impute to Messrs. Cowperthwaite and Andrews the guilt of having conspired to cheat and defraud the stockholders of the Bank of the United States.

The second head relates to the advances made to Nicholas Biddle and Joseph Cowperthwaite upon shipments of merchandise to Europe. In the earlier period of these transactions, the parties owning the cotton, and to whom the advances were made, were Samuel Jaudon and Nicholas Biddle. When, in September, 1837, Mr. Jaudon went to Europe as the agent of the Bank of the United States, his interest ceased, and was not renewed. After that, the parties receiving the advances were Messrs. Biddle and Cowperthwaite, and Thomas Dunlap.

In the case of the *Comm. ex rel. Jaudon vs. Wertheyme*, Judge Randall has very correctly observed that there is nothing in the charter of this Bank which prohibits its officers from trading in merchandise; and that, in so doing, there was nothing inconsistent with their official

duty. In that case he discharged the relator, as well as in the subsequent case of *Thomas Dunlap vs. John Thompson.* In one of these cases, the sales of the cotton on which the advances were made, had more than sufficed to reimburse the advances. In the other the result was different. But this circumstance was held by Judge Randall to be wholly immaterial in reference to the original design and motive of the parties, on which alone the cases depended.

It is rather the *amount* than the *character* of these advances on cotton to which objection seems to be taken. In every other point of view, than with reference to amounts, these transactions, disentangled from their apparent complication, are very easily understood. In 1836, Samuel Jaudon, having been sent for that purpose by the directors to Europe, negotiated two loans for the Bank of the United States; the one of one million of pounds sterling, in London, to be repaid by four equal instalments, two in 1837, and two in 1838; the other in Paris, of twelve millions and five hundred thousand francs, payable in six equal instalments, two of which were to be paid in each of the years 1837, 1838, and 1839. Again, in March, 1837, the Bank contracted heavy additional liabilities, upon the application of the merchants of New York to that institution for relief, under circumstances of great commercial distress. These bonds, thus payable in Europe, arriving at maturity, the Board of Directors, though fully informed of this, had adopted no measures for their payment.

The testimony of Mr. Cope does not therefore surprise us, when he says, "the Cashier was in the habit of exercising authority, which, perhaps, under a rigid construction of the by-laws, belonged exclusively to the Committee of Exchange, in the purchase and sale of exchange. He was known to be in the habit of discounting notes in the absence of the committee. It was known that he did, and never disputed. It was known to every member of the Board. In most instances the record was made in the discount book. The Cashier did not necessarily make report to the committee. He was not limited as to sums." And again, Mr. Cope says, "The propriety of the Cashier making loans, was never questioned at the Board, or in the committee."

The duty, then, of meeting these bonds devolved upon the officers. The directors, as a body, considered it the business of the Exchange Committee; the Exchange Committee, in turn, referred both the labor and responsibility to the officers of the Bank; and these persons, in the decline of private credit, availed themselves of the obvious, if not the *only*, resource of shipping produce instead of purchasing bills of exchange. In the pecuniary crisis which existed, there were no means of obtaining specie or safe bills for remittance to the foreign creditors of the Bank. An ordinary debtor, under these circumstances, might have shipped merchandise to be sold on his account, the proceeds to be applied in liquidation of his debts. But, from the testimony of the several directors who have been examined upon this subject, it appears that both the directors and the officers of the Bank concurred in the opinion that the ownership of merchandise by the Bank, for this or any

purpose, would involve its charter in the peril of forfeiture ; and Judge Randall, in both of the cases cited, has expressed himself to the same effect. The correctness of this opinion it is not necessary here to discuss ; because, whether the charter would have been actually in jeopardy or not, it was the duty of the officers of the Bank, in discharging the trust which the directors thus referred to them, to provide a mode of remittance which would avoid what was believed, by the directors as well as themselves, to involve so vital a hazard. There was then—and nothing can be more obvious—but *one* method of making the desired remittances in a manner not liable to this objection. This was for the Bank to make advances or purchase bills, secured by pledges of specific shipments, to be forwarded to its creditors or agents in Europe, to be there sold, and the proceeds applied in reimbursement of the advances. In such a case the excess, if any, of the proceeds beyond the amounts advanced, would belong to the borrowers ; the deficiency, if any, would afterwards have to be made good by them to the Bank. That this is a familiar arrangement in commercial business is well known. And there is a clause in the fifth article of the charter of the Bank, which expressly recognises the distinction between the *purchase* of merchandise and such a *loan* and pledge, and renders the validity of the latter unquestionable.

These officers of the Bank, therefore, bought merchandise, of which they, and not the Bank, were the owners ; and allowed it to be transmitted for sale to Europe, on their account and at their risk, by the agents of the Bank. On depositing with the Bank bills of lading to order, and effecting insurance on the respective shipments, they received from the Bank advances of so much money as enabled them to pay for the cotton forwarded. The evidence shows that no more cotton was thus purchased and forwarded than was required to meet the debts of the Bank in Europe. The purchases therefore were not liable to the imputation of forestalling or monopolizing the market. The advances were all entered in full detail on the bill books. When made by means of the purchase of bills of exchange, they were entered in black ink ; when made on bills of lading, without bills of exchange, the transaction was entered in red ink. From the bill books they passed regularly into the ledger, and from the ledger into the "State of the Bank," where they appeared under the appropriate head of "*Foreign Bills of Exchange.*"

The result of many shipments thus made, was a large surplus amount of sales beyond the advances upon the same shipments. This having been realized, it was divided among the three parties who had owned the cotton, according to their respective interests in it; which were, Nicholas Biddle one half, and the other parties one fourth each. It does not appear that, when this distribution was made, there existed any apprehension, or any ground to apprehend, a fall in the price of the remaining cotton. It is difficult to understand how they could have been required to do otherwise than divide among themselves the surplus proceeds which belonged to them. The farther transactions of the

same sort were not defined as to their duration. No *lien*, or right of retention, to answer the contingency of debts arising from the insufficiency of the proceeds of subsequent sales to pay other advances, was vested in the Bank at home, in the consignees abroad, or in any other party. But while these parties only were entitled to receive the surplus proceeds realized, it was their duty, on the other hand, to be prepared with the means of refunding the amount of any deficiency which might appear on the result of subsequent sales. This was a duty which they shared, however, in common with every person who has ever borrowed money, whether from a Bank or an individual; and it would be a strange discovery in jurisprudence, were any judicial decision to declare it to be an offence known to the criminal law, to neglect to adopt timely precautions, or fail to prepare provision, for the discharge of an unanticipated liability.

The surplus proceeds being thus divided, there occurred on subsequent shipments, a deficiency equal to about two-thirds of what had been previously realized. Two of the parties at once admitted their liability for its repayment. One of them paid, or secured satisfactorily, the whole of his proportion of the debt; the other was unable to do so in a manner as satisfactory, but gave up to his creditors the whole of his property: of this, the Bank received the greater portion, and accepted it (as appears by the directors' minutes,) in satisfaction of his liability. The third party, Nicholas Biddle, had left the Bank eighteen months before; and in answer to the application, stated, that he did not conceive himself bound to make up the deficiency which had arisen, as he asserted, from sacrifices of his property made by the Bank to sustain itself after he had left it: but, for the sake of peace he agreed to pay the whole of his share without deduction. This was accordingly done. He paid the amount of the claim; obtained a receipt in full; and the account was finally closed. It is objected, on the part of the prosecution, that this payment was inadequate, as it was made in bonds of the Republic of Texas, which were then, and are still, much depreciated. What this has to do with a criminal proceeding, we are unable to discover: but as to a case in itself sufficiently tedious and diversified, this burden has been superadded, it must be disposed of. All settlements must be judged of by the circumstances of the time when made, and not from subsequent events. We have daily before us the melancholy evidences of the depreciation of other stocks formerly in the highest credit. Although the Texan bonds were low in the market, it is in evidence that the Bank, at the time of making the settlement with Mr. Biddle, possessed information that they would soon be of par value, and probably of more than par value. These were chiefly sterling bonds, payable in London.—General Hamilton was then in London, negotiating a loan for Texas. If he succeeded, these sterling bonds would be immediately paid out of the proceeds of the loan, so that it would be a cash payment in London, where the Bank wanted funds, and all the other loans would rise to par. The question, then, of the value of this payment depended upon the success of General Hamil-

ton's negotiation. In settling with Mr. Biddle, the Bank had the strongest reason to believe in that success. The Directors consulted Mr. Jaudon, their own agent, just arrived from London, where he had himself been assisting General Hamilton, and he gave them this favourable information in a letter, which has been produced here in evidence. This letter is addressed to Mr. Lewis Waln, and is dated October 30th, 1840. Speaking of letters which he had received from General Hamilton, expressive of his confidence of effecting a negotiation of a loan for Texas, Mr. Jaudon proceeds: "I have great faith, not only in the ultimate security of its bonds, but in its establishing in a few years a solid and permanent credit. I believe that it will steadly advance; and that it already deserves a much higher credit than any of the Mexican and South American governments, which have obtained large sums in Europe." The Bank then took the chances of success or failure; and they preferred the prospect of an immediate cash payment in London, to the delay and the hazard of the negotiation incident to all other securities. Whether the Bank made a fortunate or unlucky choice, is to this proceeding immaterial. Here is an account settled, payment received, and a discharge in full given. The receipt of these securities, no matter what they were worth, we should consider conclusive, even in a *civil* proceeding, under the case of *Bayard and Shunk*, (1 Sergeant and Watts, 92,) a case as recent as May, 1841. The point there decided is, that a debt is discharged by a payment in current Bank notes, although the notes were of no value in consequence of the previous failure of the Bank, of which failure both parties were ignorant.

For the present purpose, it is sufficient to say, that in the payment on these bonds, there is no evidence of any intention to decieve; no evidence that they were purchased for the occasion; or that they were other than assets the party had on hand; and even if all these were established, there is no evidence of any *combination* to deceive, which is the very essence of this prosecution. It would be foreign to the consideration of the present subject, whether the objections of Mr, Biddle to the allegation of his liability, were well or ill founded. If every man who, with or without concert with others, disputes his liability to pay a claim, were to be held indictable, should the assumptions of his defence prove to be untenable, the conflict and perplexity of jurisdiction between criminal and civil jurisdictions would present a most extraordinary state of jurisprudence.

The prosecution suggests a two-fold objection to the advances on the cotton. *First*, that they involve a violation of the charter; and, *Second*, that the business was so conducted as to deprive the Bank of what is designated as the profits of the transaction. But these objections are utterly inconsistent with each other. The Bank was not the absolute owner of the cotton; but had only a special property in it, as lender and pledger.—Therefore it could not claim what are called profits, or the surplus beyond the amounts advanced; because these, if there were any, belonged to the owner or owners of the pledge. The same thing which was the cause of the inability of the Bank to claim the benefit of

absolute proprietorship, was, at the same time, a protection of the charter against hazard, under the most cautious construction of that point. But it is said, that the cotton was bought and paid for with the money of the Bank. In one sense, this may be correct; but not in that which can carry with it the consequences of its being, therefore, the property of the Bank. A party who lends to another money wherewith to pay for a thing which the latter has bought, does not thereby himself become the buyer or owner of the thing thus purchased;—and yet it is as much bought with his money as was this cotton bought with the money of the Bank. The transaction does not the more constitute a purchase because the party who lends the amount of the price takes an hypothecation of the thing itself to secure payment.

In making the concession that the purchase of this cotton by the Bank would have been a forfeiture of its charter, the basis of the charge of conspiracy to obtain the surplus proceeds belonging to the bank, is at once dissolved. There can be no indictment for a conspiracy to deprive a corporation of a benefit, which, under its charter, it is incapable of enjoying. The case of the *King vs. Stratton and others* (1st Campbell, 549,) was an indictment for a conspiracy to deprive an individual of the office of Secretary of the "Philanthropic Annuity Society;" which society, being held to be illegal, Lord Ellenborough decided that "therefore to deprive an individual of an office in it, cannot be considered as illegal." The case of the *King vs. Edwards and others*, (8th Modern, 320,) was an indictment against overseers of the poor, for a conspiracy to bring about a marriage of a person described as a "poor helpless woman, an inhabitant of their parish, and incapable of marriage, to an inhabitant of another parish, to whom they paid money to marry her, on purpose to get rid of her themselves, and obtain a support for her in her husband's parish." Judgment was given for the defendants, because the indictment omitted the averment that the woman was last legally settled in the first mentioned parish.

In Rex vs. Tanner, et al., (1 Espinasse's R. 304,) the indictment was properly framed in this respect; but as it was not proved that the alleged pauper was actually chargeable to the parish, it was held that the defendant must be acquitted.

The Commonwealth vs. Manly and Leach, (12th Pick. 173,) has already been cited for another purpose. This was an indictment for a conspiracy to defraud the wife of a living person of a certain promissory note made by one of the defendants, which had become a part of her patrimony, after her marriage, for her own use during the coverture.—The defendants having been convicted, it was held that the marital rights of her husband had vested the property of this note in him. The Court said "that if a fraud was practised or attempted on any one, it was on him. If he assented to the acts of the defendants, or approved of them, who has a legal right to complain? The wife having no general or special property or interest in the note, which will support the allegation that the property was in her, or that she was defrauded of it, and this being the essence of the charge against these defendants, the indictment is not supported, and the verdict must be set aside."

But it is suggested on the part of the prosecution, that an evil motive of some sort is imputable to the relators, because the fact of their ownership of this cotton was concealed from the Directors of the Bank. Five Directors have been examined upon this subject; one of whom knew, and the other four did not know, that these defendants owned it. But the testimony of Mr. Charles S. Folwell, one of the principal clerks of the Bank, establishes the fact that it was a matter of common knowledge among the clerks, and the subject of frequent conversation, at a period at least as early as when the surplus proceeds of the first shipments were realized and distributed. The four Directors who declared their want of knowledge, do not appear to have extended their researches to this point. They were apprehensive that the cotton might be the property of the bank, and that its charter might thus be endangered. On this subject they made inquiry of Mr. Cowperthwaite, who informed them that the Bank owned none of the cotton, and never had owned any of it. In this he stated the truth. They did not inquire who *did* own it; and do not appear to have troubled themselves about the matter. If the ownership of the cotton had in fact been studiously concealed from the Directors, it might have formed a question whether the parties should be continued as officers, though it could not, accompanied by the circumstances over which we have gone, have formed the basis of any criminal proceeding. But the ignorance of the Directors generally upon a subject which one of their number at least knew, and which seems to have been within the knowledge of all others about the Bank, is inexplicable.

We are unable to discover any thing of "*probable cause*," for remanding the relators, under the second head of the prosecution.

The third and last head is that of cash paid on receipts of the officers of the Bank; the specific application of which does not appear on the books or vouchers. In the investigation of this charge, the evidence has been applied to three subdivisions, viz:—

1st. $128,000 paid on receipts of a Committee of Directors in the springof 1840.

2d. Large sums paid on receipts of officers of the Bank, between May, 1836, and December, 1839.

3d. The sum of $400,000 paid at various times, before the expiration of the charter of the National Bank, in January and February, 1836.

Why the first of these three items of alleged offence should have been introduced into *this* prosecution, we are at a loss to imagine. It has not been even for a moment attempted to connect these parties with it; and it forms the basis of a proceeding against *other* parties, some of whom are now upon hearing before one of the Judges of this Court. Mr. Biddle had left the Bank a year before the date of the transaction; Mr. Cowperthwaite was absent on a distant journey; and Mr. Andrews, who had been the acting officer as to most of the earlier payments, had not the most remote connection with these. Whatever was done, was not by any of the officers, but exclusively by the Directors of the Bank.

Yet, it may not be immaterial to notice, that, if the allegations of the prosecution are founded in fact, a Committee of the Board of Directors adopted and pursued precisely the same course here, which had been previously pursued by these parties, as officers of the Bank, in regard to the subject which is to be presently considered under the second subdivision of this head of the case.

At a meeting of the Directors of the Bank, on the 3d of March, 1840, it was unanimously resolved that a committee of three Directors be appointed, with authority to proceed to Harrisburg, and generally to adopt such measures as they might find necessary to protect the interests of the Bank. Whereupon, the committee was appointed, consisting of George Handy, Richard Price, and Lawrence Lewis. On the 10th of July following, on motion of one of its members, this committee was discharged. On examining the accounts of "permanent expenses" and "losses chargeable to contingent fund," it appears that, of payments made while this Committee was still in existence, the sum of $99,200 was carried to the debit of the former account, and $28,800 to the debit of the latter. The account of *permanent* expenses is one, the purpose of which is sufficiently defined by contrasting it with the head of *ordinary* or *current* expenses, of which it is the opposite. Items charged to "permanent expenses," remained under this head upon the books, until passed at intervals to the head of "profit and loss." "Losses chargeable to the contingent fund" was also in the nature of a profit and loss account. It differed from the account of "permanent expenses," strictly so called, in being an original head, to which many items were entered upon their first appearance on the books—the transactions in respect to them being finally closed by such original entry. The items carried to "permanent expenses," could not be thus closed until carried to "profit and loss." Whenever this operation occurred in respect to this account, it appears to have been performed by an act of the Dividend Committee, reported to the Directors, and appearing on the minutes. The $99,200, charged to *permanent expenses*, was added to the $200,000, the *bonus* paid to the State during that half year; and appeared, on the "State of the Bank," and in the "Report of the Dividend Committee," as bonus and permanent expenses, of $299,200.

About the end of June, 1840, under the examination of this committee, this account was carried to "profit and loss;" and the operation of transferring it to that account was inserted on the minutes. The account was thus closed; although nothing appears to indicate the application which had been made of the moneys. The vouchers show that the whole amount had been paid on the receipts of the committee appointed on the third of March to proceed to Harrisburg. The then acting Cashier appears to have paid the money, or to have permitted it to be received from the teller, entirely upon their receipts. If the Directors were generally ignorant of the particulars of this transaction—a somewhat violent presumption—this circumstance serves the more completely to establish their acquiescence in the practice of letting the head of "permanent expenses" remain on the books without a particular specifica-

tion of the moneys included under it.—The result on this point appears to be, that the members of the board are not less responsible than the officers for any want of clearness of specification of the application of moneys paid, if such want of clearness exists, and is deemed material.

The items paid upon orders or receipts of the officers, for amounts credited to cash, and passed to the head of "permanent expenses," form the next subject of examination. Of these items, of which the particulars are numerous and of large amount, some were paid upon tickets or memoranda, on which the amounts appear to have been immediatetly passed into the books, to the head of "permanent expenses." In other cases, where there was no such ticket, the receipt or voucher contained on its face the direction to charge the amount to this account. Sometimes no such direction accompanied the original receipt or voucher; in such cases, the vouchers remained in the teller's drawer, embraced in a line or head of "*sundries*" upon his daily statement, until a ticket or order was given for transferring them to the account of "permanent expenses," when they were transferred to it accordingly. This was sometimes delayed for a short time, but was always done before the end of each year, when the statements were to be completed, with a view to a dividend. In the mean time, they appeared on the "State of the Bank" as so much cash; but an inspection of the teller's daily statement would always have shown that this head of cash was composed of different heads, or lines, of which this of "sundries" was one. Such a line, under the same name, appears, from an inspection of the teller's book, to have been upon it for twenty years; and the particulars composing it were always kept at hand in his drawer. But the delay to give the proper tickets for these items is unimportant, as it was always duly given before the end of the current half year. One of the directors has testified that no inquiry was ever made at the Board about either the purpose or the cause of the "permanent expenses." But in this he is evidently mistaken, or his testimony must apply to a portion only of the period embraced in the accounts; because, in 1839, a committee reported to the Board a recommendation, which is upon the minutes, that the "bonus" and "permanent expenses" should be distributed over the whole period of the charter, in making out a balance sheet or statement then under consideration.

Another committee examined several of the vouchers of items of this account. The vouchers were always at hand for all of the items; and there does not appear to have been any secrecy or concealment in regard to any of them. In some instances, the vouchers are in the hand-writing of the officers signing them; but more frequently in that of the various clerks in the bank. The tickets are usually in the hand-writing of the first bookkeeper or general accountant. Every thing seems to have been done in a manner calculated to stimulate rather than to repress investigation, if the transactions had been of a character disapproved of by the directors. Moreover, this very head of "permanent expenses" includes a great number of items, such as premiums paid for specie, &c., to the amount or several hundred thousand dollars, which

appear under no other head of the accounts; and which, to any directors paying ordinary attention to their duties, must have formed the subject of serious consideration. But that this form of conducting the business was known to some of the directors, and approved of by them is plainly manifested by the course afterwards adopted and pursued by themselves, in 1840.

There is no proof of the actual misapplication of any part of the moneys upon the receipts of the officers. It is true that the amounts are large. But proportionably to the time over which these accounts extend, they are of smaller amount than that which was paid on the directors' receipts. Even if singular that their actual application should not appear on the books, there is still nothing before us to furnish materials for speculation as to the causes of the omission. If it pleased the directors that the business should be thus conducted, the officers who were their servants, are not rendered criminally liable for having followed the routine prescribed, or approved of, by their employers. The amounts were all entered openly on the books; and if they forebore to require, at the time or afterwards, a detailed account of the application, it could only be because, although possessed of all the facts which have been disclosed to the court, and, necessarily, of much other information of which we have no knowledge, the directors saw or suspected nothing of fraud or a criminal combination to cheat the stockholders. On the "State of the Bank" and "General Ledger," the accounts of *individual depositors* were kept with no greater or more precise specifications than this head of "Permanent Expenses," or the head of "Bills Receivable." The Ledger of the individual depositors' accounts of course furnish a complete analysis of the particulars of this head. The then accountant-general states, that on examining some of these accounts of individual depositors, he has been able to verify about $70,000, from this very head of "Permanent Expenses" now under consideration, as having been passed to the credit of different persons having accounts with the bank, by whom it was checked out and used. This may serve to manifest how unsafe it would be to attribute any fraud, in the absence of all proof, as to other items of the account, merely because similar means of ascertaining their application may not have been discovered, or may not now be accessible. The summary of the evidence on this subject may be given in the words of the same witness. He states that, according to the ordinary course of the business of bank, "the supervision of the 'Permanent Expense Account' would be with the cashier or first assistant cashier. It would be subject to the control of the 'Committee on the State of the Bank,' and would form a part of their duty of investigation. This committee made half yearly examinations of the cash and effects of the bank; and met whenever they pleased, or whenever any subject was referred to them. The 'Permanent Expenses' would also pass under the examination of the 'Dividend Committees.' All the vouchers were always in the bank, and could always be had when called for. They remained for some time

after their charge in my possession as first bookkeeper; and, afterwards, in my possession as accountant-general."

The remarks already quoted from Judge King in the case of the *Commonwealth vs. Ridgway*, as to the burden of proof that rests upon the prosecution in cases of this description, if sound doctrine—of which no doubt can be entertained—furnish a conclusive answer to one of the propositions assumed by the counsel who opened on the part of the Commonwealth, in reference to this branch of the case. The counsel contended that if the application of certain moneys, paid on the receipts of the relators, as officers of the Bank, and entered on the books of the Bank, were not shown, upon the present hearing, to have been regularly made, then the presumption would necessarily arise of a fraudulent application. It was further suggested by the counsel that the relators would be called on for an account of the manner of expending the money; and that, if no satisfactory answer were given, the Court must act upon the presumption that it had been obtained, upon the false pretence of receiving it for the use of the bank. This is a proposition subversive of every principle of law by which, in criminal proceedings, the rights of the citizen have been heretofore protected. It is to shift the *onus probandi* from the prosecution to the party accused. It is to say that, an accusation having been preferred, of whatever character, the accuser shall not be held to make good his accusation, by proof of at least "*probable cause*," but that the accused shall be held to repel the *charge*, in the absence of any and all testimony of guilt. To tolerate this doctrine, would not only convert a criminal proceeding into a *Bill of Discovery*, but would sanction—nay, demand—a species of self-crimination which even the searching powers of chancery have never claimed to themselves to arrogate. It is a general principle, not restricted to Bills of Discovery, (*Franco vs. Bolton*, 3d Vesey Jr. 367,) that no person can be required to discover any thing that may subject him to prosecution, or indeed a legal accusation. The rule is recognized and forcibly commented upon by Judge Hopkinson, in the case of the *United States vs. Twenty-eight Packages, &c.*, (Gilpin's R. 313,) who emphatically asks and answers the question as follows:—"Would a Court of Chancery, on a Bill of Discovery, compel a party to produce evidence which would subject him to a forfeiture? I think not. No such order has been shown by a Court of Equity; and the authorities that have been referred to hold a different doctrine." In *Harrison vs. Southcote*, (1st Atkyns, 509,) Lord Hardwicke applied this doctrine, although it did not certainly appear whether the discovery *would* create a forfeiture, because, he said, that eventually it *might* do so: and in *Claridge vs. Hoare*, (14 Vesey, 64,) Lord Eldon said:—"A defendant has a right to insist that he is not to be compelled to answer not only the broad and leading fact, *but any fact*, the answer to which may *furnish a step* in the prosecution, if any person should choose to indict him."

If such be the rule even in a *civil* proceeding, where perhaps an account merely is sought to be adjusted, with a view wholly distinct from that of the enforcement of a penalty, how much stronger is the reason for

rejecting the position *here* contended for, in a prosecution directly criminal—one in which the Constitution itself secures to the citizen an immunity from being compelled to give evidence against himself. Moreover, a preliminary hearing is an *ex parte* one, in which no witnesses are heard except those for the prosecution; and the suggestion of the counsel here commented upon, elicited from the Court the intimation that, under the uniform practice, no testimony could be received for the relators. The prosecution must therefore stand or fall by the strength or weakness of its own testimony. Even had there been proof that the relators had omitted to account for the moneys referred to, when judicially called upon to do so in a civil proceeding, the well settled rules of law and evidence would forbid the deduction of an unfavorable inference against them from this circumstance, in the same or in a collateral proceeding. There has been no proof before us, however, of any refusal or omission to give such an account.

Another observation which may here be made is, that although the official relations of these parties to the Bank of the United States might aggravate their guilt in respect to any conspiracy provable against them, yet it does not of itself serve to furnish any evidence of guilt, and in no manner can serve to dispense with such proofs as would be required, if they were entire strangers to the institution. In truth, this very circumstance, under certain heads of inquiry, may have an opposite effect. If a particular act, not on its face wrongful, appears to have been done in an *official*, and not in a private capacity, the original presumption is that it was a duly authorized act; and this presumption must prevail until the contrary appears. Some of the acts complained of cannot be considered indictable, until first divested of the official character which apparently belongs to them. In that character, they are acts of the corporation, as between the corporation and the relators; and as such, are not indictable in the present proceeding. For example, if a sum of money, proved to have been paid by the Teller, upon the receipt, or other voucher, of the President or the Cashier, is entered on the books of the Bank to an account which purports to contain the entry of moneys expended for the use of the Bank, the legal presumption in the first instance is, that it was in truth thus expended; and some further evidence becomes necessary, on the part of the prosecution, to warrant a belief, that can be acted on judicially, that it has been misapplied. If, with the approbation or acquiescence of the Directors, the books kept by the clerks and accountants of the Bank, under the superintendence of the Directors, were not kept in a manner to indicate on their face the particulars of the expenditures of these sums, this circumstance furnishes no ground to impute any default or misapplication of the money, to those who subscribed the vouchers. It merely shows that the Directors of the Bank were content that such sums should be thus disbursed, without requiring that their application should appear upon the books.

One of the first acts of the Board of Directors under the State Charter, was the adoption of a resolution that the by-laws, rules and regula-

tions of the late Bank should be continued in force. There is evidence before the Court of the manner in which a subject analagous to that now under consideration was regulated by the Directors of the late Bank. The minutes of the Board of the 16th of August, 1833, which have been read to us, were then, or made shortly afterwards, matter of public notoriety. The stockholders had several meetings after they became thus publicly known, and before the failure of the institution. Yet the act of the Directors was never disavowed. From these minutes it appears that, on that day, Mr. Gilpin, then a Government Director, offered a preamble and resolutions, calling for *a full and particular statement from the Cashier of certain expenditures* made under resolutions of the 30th of March, 1830, and 11th of March, 1831, and rescinding those resolutions. Upon motion of Mr. Chauncey, the preamble and resolutions of Mr. Gilpin were postponed, to enable him (Mr. C.) to offer a resolution, which is in these words: "Resolved, That this Board have confidence in the wisdom and integrity of the President, and in the propriety of the resolutions of the 30th of November, 1830, and 11th of March, 1831, and entertain a full conviction of the necessity of a renewed attention to the objects of those resolutions; and that the President be requested to continue his exertions for the promotion of said objects." An amendment, offered by Mr. Gilpin, having been rejected, the question was taken on Mr. Chauncey's resolution, and it was adopted by the following vote: *Yeas*—Messrs. Willing, Bevan, White, Fisher, Lippincott, Chauncey, Holmes. *Nays*—Messrs. Macalester, Gilpin, Sullivan, Wager. This signally demonstrates how unjust it would be to establish, in a *criminal* proceeding, particularly after the lapse of so many years, an inquisitorial jurisdiction, such as the opening of the prosecution intimated, which the Directors of the institution thus by formal vote refused to assert in reference to their *civil* relations with the officers of the Bank.

As regards the $400,000, the case stands thus upon the evidence:—During January and February, 1836, large sums of money were paid by the first Teller, (Mr. Jonathan Patterson,) to Mr. Andrews, the then first Assistant Cashier, who told him that he received them for, or by order of, the President of the Bank. There were tickets or receipts for these sums left with the Teller, at the foot of which were always the initials of Mr. Andrews' name. About $350,000 thus received from the Teller was taken away by Mr. Andrews; and the remainder placed in the vault, until called for shortly afterwards. At the close of February the whole amount was $400,000, which remained in the line of "sundries" on the Teller's statement, on the 1st of March, 1836. On that day, ten post notes of the Bank, each for $40,000, were brought by Mr. Andrews to the Teller, who received them in the place of the tickets or vouchers for the like amount previously paid. On the same day, the line of "sundries" in the Teller's statement was reduced $400,000, this credit being balanced by an equal amount charged to the account of Parent Bank Notes, as for such an amount of notes cancelled. On the same day, these, among other notes of the old Bank, were counted and

burnt, under the direction of the "Committee on the state of the Bank;" who, on the 10th of March, reported to the Board of Directors of the old Bank the particulars of the notes which they had counted and burnt, including a specific mention of the item of $400,000.

In December, 1835, there had been called by advertisement, ordered by the Board of Directors, a meeting of the Stockholders of the late Bank of the United States, to be convened on the 17th of February, 1836, for a purpose specified in the call, and to consider such other matters as might be laid before them. This meeting was continued, by adjournments, until the 19th of February, 1836, when the charter from the State was presented to its consideration and accepted. Mr. Cope testifies that the procuring the charter was a matter which had been informally discussed among the members of the Board of Directors. Directors, it was understood, went frequently to Harrisburg. Doctor Burden's testimony renders it probable that many persons besides Directors visited Harrisburg for the same purpose. This witness (then a member of the Senate) says: "The lobbies were crowded with men—and, although I have no means of saying that they were there particularly in favor of that charter, yet every body who was there seemed to be in favor of it." The witness added, in reply to the interrogatories of the prosecution, "I do not know of any improper means used to obtain the charter. If I had, I would have brought the parties before the bar of the Senate. I neither saw nor heard of any gifts or gratuities, or any thing of the kind." Mr. Joshua Lippincott testifies that he was then a member of the Board of Directors; and that the subject of applying to the State for a charter was brought before the Board in December or January; that the Directors knew, and he himself had no doubt, that large expenses had been incurred for that purpose, but that it was not known that so large a sum was necessary; that the Board did not examine into the subject; that the sums put down to the "Permanent Expense Account" were supposed to be for that object. He also stated that, at the meeting of the Stockholders, the President said that the surplus would cover the bonus, and the expenses of obtaining the charter.

From the questions put to the various witnesses by the prosecuting counsel, in the progress of this investigation, it seems to have been supposed that this amount of $400,000 was in some manner appropriated towards the expenses of obtaining the charter. Of this there is no direct evidence—but, upon a comparison of circumstances, it appears very probable. Mr. Patterson, who had been first Teller in the old Bank, and who was so continued under the charter from the State until September, 1841; and Mr. Thomas S. Taylor, who had been, also, an officer in the old Bank, and who held the post of Accountant-General in the new until the 14th of March of this year, when he resigned; are the principal and most material witnesses who have been here examined. Without their aid—particularly that of the latter gentleman—it is improbable that the vast number of accounts, statements, and other items of numerous description, to which the attention of this investiga-

tion has been directed, could have been unravelled from their complexity. Both of these witnesses, not only called by the proseeution, but acting as officers of the Bank after the withdrawal of these relators from the institution, and thus occupying a position of official hostility towards them, have here avowed their belief, in the strongest terms, that every dollar of this money was expended for the use of the Bank.

The report of the committee of nine on the valuation of the property of the Bank, states that the joint committee of six had originally made an allowance of $400,000 for the probable gain of the circulation of the Bank, arising from the destruction of the notes of the old Bank; but that the three gentlemen whom they had called to their aid were of the opinion "that the allowance for probable gain on the circulation should be withdrawn, and considered as an equivalent for contingencies not sufficiently provided for by the reduced rates of guarantee." It is a remarkable coincidence that this head of the circulation should have been thus selected as the equivalent of this reduction of rate of guarantee, with which it had no more connection than any other head of the balance sheet. The Parent Bank note account being charged with notes subsquently brought in and cancelled, the result was, that, in June, 1839, the total thus exhibited exceeded the aggregate of the previous issues. This circumstance was afterwards mentioned by the Teller to Mr. Andrews, and was by him communieated to Mr. Dunlap, the then President of the Bank, who submitted the matter to eight of the Directors. By their order, an error in the "account of Parent Bank notes" was corrected by crediting to that account the $400,000 charged to it in 1836, and crediting the same to the account of "Losses chargeable to contingent fund," in which account the entry appears in these words:

"To parent bank notes account, per journal entry, June 30 1840, to correct an error in the circulation of the late bank, parent notes, arising from an erroneous entry of March 1, 1836, in the books of the late bank, . $400,000"

This aet of nine members (including the president) of the board of directors, charging the $400,000 to this aecount, is a distinct recognition by them that the amount belonged to the account of a transaction which was to be considered as closed, and not to remain open upon the books. By the charter of the bank, seven directors, the president being one, constitute a quorum of the board for the transaction of business. The directors who acted upon this oceasion were more than a quorum, but it does not appear that the act was done at a stated meeting, or at a special meeting, duly convened under the by-laws; nor is it recorded on the formal minutes. But a full minute of the proceeding was made out at the time, in the handwriting of the general accountant of the bank, certified at the foot by the teller and Mr. Andrews: and this has remained from that time to the present, nearly two years, on file, as an explanation of the entry to "Losses chargeable to Contingent Fund." This entry still appears, unreversed and unchanged, on the books. Under these circumstances, it must be deemed as binding an act of the corporation as if passed at a regular meeting of the board.

The case of *Gordon vs. Preston*, (1 Watts, 385,) is a case directly and most emphatically in point. The question was upon the validity of a mortgage purporting to be the mortgage of a corporation. The objection to its validity was, that the resolution of the directors, authorizing its execution, was not passed at a regular and legal meeting of the Board, and that all the members had not received notice of it. The facts were these: The resolution was passed, and the mortgage executed, not on a charter day, or a day appointed by a by-law; but at a special meeting, convened without notice, written or verbal, to the directors who did not attend. The Board consisted of nine members, of whom five were a quorum; and this was the number assembled. The mortgage was to the President and Treasurer, who were themselves present at the meeting. The Court said, "here an extraordinary act was to be performed; the hypothecation of the real estate; and there was, therefore, the greater reason that all the directors should be summoned." It is clear says Chief Justice Gibson, "that the mortgage did not originally bind the corporation. But can the act be impugned now? A corporation, can contract but by its agents, general or special; and in pursuance of powers delegated, specially by its grant to particular persons, or generally by its charter to the officers entrusted with its affairs. Hence the members of this Board stood in relation to it as servants whose acts may be disaffirmed for defect of authority, but by their master. But the maxim which makes ratification equivalent to a precedent authority is as much predicable of ratification by a corporation as it is of ratification by any other principal; and it is equally to be presumed from the absence of dissent. Now the validity of this mortgage is unquestioned by the corporation even at this late day; though its existence had all along been known to the corporate officers, whose duty it was to disavow it, had there been an intent to contest it. The corporation then being satisfied with it, who has a right to object?" The application of this decision, and particularly the language just cited from the opinion of the Chief Justice, to the minute made on the 29th of June, 1840, (by which it is shown that the nine directors, whose act it records, were entirely aware of every fact which has been adduced in evidence before the Court,) settles the question as to the legality of the disposition, by the Stockholders of the Bank of the United States, through their authorized and only representatives, of the regularity of this amount of $400,000.

But although the Corporation may have thus closed the transaction as between itself and the relators, yet if concert between them in a criminal design be shown to have existed, either in regard to the receipts of the money or in relation to the notes which were cancelled, this subsequent act of the corporation cannot wipe away the previous offence. There appears to be nothing in the evidence to distinguish the original transaction, in respect to this sum of $400,000, from those which afterwards occurred as to the items charged to "permanent expenses." On the part of the prosecution it has been attempted to prove that the money was paid by Mr. Andrews to Mr. Biddle. This is not proved: but, even if it were, it would be unimportant in the absence of

any testimony as to the fraudulent intention or application of the money by that party. Mr. Andrews' statements to Mr. Patterson are not to be received in evidence until *concert* between himself and the absent party shall have been first established; and his subsequent statements would not be received against him for any purpose. Had the counsel for the relators objected to these statements, the well settled principles of the law of evidence would have compelled us to reject them; and our notes would then have been unencumbered with any thing relating to this allegation of fraud. It is certain that had the relators, by their counsel, availed themselves of their right of objection, the entire testimony as to the $400,000, which they have thus permitted to be introduced, must have been excluded. The policy that dictated an opposite course, has induced an investigation, which, however exculpatory of the parties in its results, has imposed upon us a loss of time that might have been spared, and an extent of labor that might have been obviated.

The rule of evidence applicable to conspiracy is, that *before* the acts or declarations of one conspirator, in furtherance of a common design, can be admitted as against others, *the proof of connexion must be established;* and this, in the language of the learned annotator of the last American edition of Philips on Evidence, (2d vol. 177,) "*is always an indispensable preliminary, addressed to the Court.*" The rule is without exception, except sometimes as to the mere order of testimony, which cannot affect the principle.

The previous combination, it has been decided, in the case of the *Commonwealth vs. Crownishield*, (10 Pickering, 427,) may be proved by one competent witness; but this much, at least, is necessary. Even supposing that Mr. Andrews obtained this money for his own use, (of which there is no proof,) and with intent to defraud the stockholders, proof is indispensable in this proceeding, that he *confederated* with some person or persons for that purpose. The very gist of conspiracy is this criminal confederacy; and so essential is it to the existence of the offence, that even if nothing is done in pursuance of it, it is still considered complete: *Commonwealth vs. Judd*, 2 Mass. R. 337; *Commonwealth vs. Tibbetts*, 2d Mass. R. 538. In the case of *Collins and others vs. the Commonwealth*, (3d S. & Rawle, 223,) Judge Gibson remarks:—"In this indictment, the fact of confederating is the gist of the offence. The overt acts charged to have been done in pursuance of the conspiracy, are only matters of aggravation, and not necessary to the consummation of the crime, which would be well laid if all the overt acts were omitted." Indeed, so precise is the doctrine upon this subject that where the overt act amounts to a *felony*, the conspiracy is *merged.* This was held in the *People vs. Mathers*, (4th Wendell, 265;) and in the *Commonwealth vs. Kingsbury and others*, (6th Mass. R. 108,) the law was declared to be the same respecting *misdemeanors.* It was mainly upon the authority of this latter case, that a call was made upon the Judge who tried the case of the *Commonwealth vs. Hassinger and Wright*, at the last November Session of this Court, to instruct the jury

that if the misdemeanor which the defendants were charged with having conspired to commit, had been perfected, the conspiracy was merged, and they could be indicted only for the overt act. Holding with the doctrine in 4th Wendell that the merger applied only to felonies, the jury were so charged; and the defendants having been convicted, upon a motion in arrest of judgment, this nisiprius opinion was unanimously sustained by the Court in bank. It may be worth remarking that all three of the counsel who *here* prosecute, *then, also*, conducted the prosecution, and thoroughly pressed upon the consideration of the Court, the doctrine which we then sustained, as we do now, as being in conformity with all the law upon the subject, viz: that it is the *unlawful confederation*, and not the *overt act*, which constitutes the offence of conspiracy. The cases of *Respublica vs. Ross* (2d Yeates, 8,) and *Commonwealth vs. McKisson and another*, (8th S. & Rawle, 422,) are very pointed upon this subject. In the former case, it was held that a conspiracy is an indictable offence, even though nothing be done in pursuance of it; in the latter that no overt act being necessary to the character of the offence, none need be laid in the indictment.

This, then, being the law, it was not the reception of the various sums, resulting in this aggregate of $400,000, from Mr, Patterson to Mr. Andrews, which constituted the offence; but the having criminally conspired with Nicholas Biddle so to receive them; and that confederation once established, the actual obtaining of the money was an overt act, forming an aggravation indeed, but still a wholly immaterial ingredient to the completion of the offence. But there is another consequence which the law induces. The *confederacy* being of the essence of the crime, and the *overt act* an immaterial sequence, the principle already referred to presents itself, that no testimony can be received as to the latter until the former has been established. The acts and the accompanying declarations of Mr. Andrews are relied on by the prosecution: the first, the actual receipts of the money—the last, his assertion to Mr. Patterson that he came from, or was sent by, Mr. Biddle. The law in criminal and civil proceedings is alike upon this subject; and the difficulty is not in finding, but in selecting, authorities. In an indictment for Conspiracy, the overt act of one conspirator is the act of all the others; and, says Mr. Phillips, (2nd Evidence, 95,) "any declarations made by one of the party, *in pursuance of the common object of the conspiracy*, are evidence against the rest of the parties, who are as much responsible for all that has been said or done by their associates *in carrying into effect the concerted plan*, as if it had been pronounced with their own voice or executed with their own hand." This principle, so clearly laid down, as clearly suggests the indispensable preliminary. Before the reception of the money from Mr. Patterson by Mr. Andrews can assume the character of evidence, or before it could have been received by the Court, if objected to, the *previous criminal confederacy with Nicholas Biddle must have been proved.* At least the "one witness," called for in the case of *Commonwealth vs. Crownishield*, must have spoken. But here the process of *circular*

reasoning, which is rejected in logic, and which cannot be accepted in law, particularly in a criminal proceeding, is pressed upon the Court. We are asked to infer the conspiracy of two parties from the reception of these moneys by *one*; and to infer that he received it for *both* because of the previous conspiracy. This doctrine is to be sustained only by a rejection of the most obvious dictates of reason, and by shutting our eyes and turning our backs upon the almost innumerable conformable decisions with which the books are crowded. The very first witness called for the prosecution, (Mr. Patterson,) was called upon to prove this alleged *overt act* of Mr. Andrews; and this was the very first point to which his attention was directed.

In the case of *Clayton vs. Anthony*, (5th Randolph, 285,) Judge Green remarks: "Whenever the question whether any evidence offered is or is not admissible, depends on other facts already proved, the Court, whose province it is to decide the question as to its admissibility, must of necessity judge and determine the effect of the evidence already offered to prove the fact upon which that question depends." And in the same case, Judge Colter says: "The evidence was offered as the evidence of one of two confederates in an unlawful act; *but, before such evidence can be given, there must be proof of the confederacy*, of which the Court is to judge." In the case of the *American Fur Company vs. the United States*, (2d Peters' S. C. R. 365,) Judge Washington says: "We hold the law to be, that where two or more persons are associated together for the same illegal purpose, any act or declaration of one of the parties, *in reference to the common object*, and forming a part of the res gesta, may be given in evidence against the others." In *Patterson vs. Freeman and others*, (Coxe's R. 119) which was an action on the case brought for the recovery of damages sustained by certain frauds of the defendants, the declaration of one defendant being offered in evidence, it was objected to, in consequence of the absence, at the time when made, of the party whom it affected. But the Court received it upon the ground that there had been "*proved a connexion between the parties in order to perpetuate the fraud;*" and it was, "*therefore*," unexceptionable to prove the conversation in question. With the citation of three authorities from our own Supreme Court, we will close this branch of the subject. In the case of the *Committee vs. Eberle and others*, (3d S. and Rawle, 9,) the defendants, fifty-nine in all, were indicted for a conspiracy to interfere with certain rights of a religious congregation: it was held that the declarations of one party are evidence against others only after their being engaged in a common enterprise has been proved. In *Reitenbach vs. Reitenbach*, (1 Rawle, 362,) in which the validity of a judgment by a father in favor of his son was questioned, the Court sustained the admissions of one party in the absence of the other, *after* the creditors "had established by proof a combination between the father and son to defraud and delay creditors." And in *Wilbur vs. Striekland*, (1 Rawle, 458,) in which the reception of similar testimony by the Court below formed the allegation of error, the same decision was rendered, and for the same reason.

These authorities are decisive of the question that evidence *other* than the acts or declarations of Mr. Andrews merely, must be adduced to establish the unlawful confederacy; and of this the counsel for the prosecution seem to have been fully aware, as they laboured assiduously to supply the deficiency, by the testimony of Mr. Patterson, upon whom they rely for this purpose, also. His testimony, independent of two recent conversations with Mr. Biddle, is confined to the statement that Mr. Andrews, after receiving the money, walked towards that part of the Bank in which Mr. Biddle's room was situated. The conversations of the party, having been adduced in evidence by the prosecution, are to be received subject to the settled rule that they are thereby made evidence in his favour as well as against him. It appears that the subject of this $400,000 had been noticed in the publication of a report of a committee of stockholders of the Bank, after Mr. Biddle had left the institution; and that, shortly afterwards, he had two conversations with the witness, in one of which he remarked that he supposed the money had been spent as the other money had been spent; and in the other one, said that he gave no directions as to that charge of the $400,000; that it would have been better to have made the charge to "permanent expenses;" and that if Mr. Andrews had brought that money to his room, he must have paid it away to other persons; and that he had no recollection of having received it. This is the only evidence upon which, in reference to this transaction, concert for an evil purpose is sought to be imputed to Nicholas Biddle. Its effect, positively as well as negatively, has an opposite tendency. On the whole evidence, the receipt of the money must be taken to have been by Mr. Andrews alone. As regards him it might not be necessary to pursue the inquiry, because the offence of conspiracy cannot be committed by one person only.

The remaining circumstances relied on by the prosecution, are the cancellation of the ten post notes for $400,000, and consequent account to the charge of the parent bank. On this part of the case likewise, Mr. Andrews is the only party to whom the evidence applies; and no collusion is shown between him and any other person. Here the main allegation is that the notes thus charged had never been issued; and therefore the cancellation of them, and entry in the "Account of Parent Bank notes," was an irregular if not a false entry. The fact that they were never issued is proved as against Mr. Andrews, by his subscription of the minute of the 29th of June, 1840. Mr. Patterson's signature is also to the same minute. From this circumstance, an imputation of conspiracy between *him* and Mr. Andrews might be inferred with as much plausibility as between Mr. Andrews and Mr. Biddle; but nothing of the kind is pretended; and if there even were, the witness having been called and examined by the prosecution, regard must be paid to his testimony in his own favor. He states that he did not know that the ten post notes had not been in fact issued. No evil motive can be imputed to him; because if the notes had really been issued, there would have been nothing objectionable in the exchange of them for the original receipts, or in the cancellation and consequent

charges upon the books. There is no reason to doubt the truth of Mr. Patterson's statement. It is confirmed by his omission to keep the original receipts, or vouchers, upon which he had paid the money. He says that he cannot tell what became of them, that they were not in his opinion, of any value after that: he considered the charge as settling the receipts, and the notes as a substitute for them. It appears, on examining the register of post notes, that at that period they were frequently issued payable, as these were, three days after date; and that they were issued for even larger amounts than $40,000. There was not, on the face of them, therefore, any thing to induce a doubt in his mind of their having been issued. This witness is thus acquitted of concert or combination of any sort. There is no proof how, and by whom, the notes were prepared. But even if the act of Mr. Andrews, it could have been effected by him alone, as well as in connection with others; and as there is no evidence of such connection, the case, under any and every view of it, wants the essential ingredient of the very definition of conspiracy.

The many, and sometimes complicated, details embraced within these *three distinct charges of conspiracy*, the great number of accounts, letters, papers, and proceedings of the Board of Directors, and committees of the Boards, which it has been necessary fully to examine, and the circumstance that we have heard *as one* the three cases, in which the parties each claimed a separate hearing, have rendered unavoidable an expression of the views of the Court so extended as to seem to require at the close a brief recapitulation. Divested of all extraneous matter, the cases are the following:—

First. The conspiracy charged against John Andrews and Joseph Cowperthwaite is, that, with intent to cheat and defraud the stockholders of the Bank of the United States, they criminally confederated to obtain certain loans, the payment of which they failed to make good. The evidence is that they were not joint, but in reality, separate loans, although a portion of them was upon a common security; and that they were obtained from the committee charged with the superintendence of the business of the department of the Bank, precisely in the same manner in which loans were obtained by all other persons, upon securities which were approved of and accepted by the committee, and the full value of which, at the time they were offered and received, there was not the slightest reason to question.

Second. The charge against Nicholas Biddle and Joseph Cowperthwaite is, that they conspired to cheat and defraud the Bank, by obtaining therefrom large advances upon shipments of cotton to Europe; of the fortunate sales of which they retained the surplus proceeds or profits, while the losses were sustained by the Bank. The evidence is, that the Bank had no interest whatever in this cotton; and that it was the opinion of all the Directors and officers, that it could not deal in merchandise without incurring a forfeiture of the charter; that these advances were made to the parties as to ordinary individuals; and that the transaction was open, known generally to the officers of the Bank,

and within the reach of the knowledge of any and all of the Directors. That these operations in cotton were rendered indispensable by the liabilities of the Bank in Europe, and the failure or omission of the Directors otherwise to meet their foreign engagements; and that these operations were not only lawful in themselves, but eminently useful to the Bank, and originally profitable to it; and although, at their close, losses were occasioned by them, growing out of the prevailing commercial distress, these were made good to the Bank by the parties, upon terms which the Directors considered, accepted, and thus closed their account. And that, in settling with Nicholas Biddle, the Bank had private information, received from their own immediate agent, that the stocks or bonds which they received as of par value, would probably soon be above par.

Third. The conspiracy of Nicholas Biddle, Joseph Cowperthwaite, and John Andrews, to defraud the Bank by the unlawful receipt and expenditure of large sums of money, the application of which is not specified upon the books. But there is no evidence before the Court of the mis-application of these sums by any person. The only charge of fraud is that the application does not appear on the books; but this is shown to be in accordance with the routine of business and general usages of the Bank—always prescribed or sanctioned by the Directors; and it has been particularly shown to the Court to be the case as to a vast number of items—of which the actual, correct, and faithful application has been ascertained; and there is no evidence that it was incorrect or unfaithful in the items complained of. The transactions as to the $400,000 affect Mr. Andrews alone, and, therefore, could not, under any circumstances, form the basis of an indictment for conspiracy. But even as regards him, the alleged erroneous entry was corrected by the Directors, in a manner which precludes the idea of their attaching to it any thing of either civil or criminal liability; and the whole matter is proved to have been known to, scrutinized, acquiesced in, and finally adjusted and closed by, the Directors.

In all that has been said, it has been assumed that the Directors represented the corporation, and were authorized to manage its affairs. Their authority for this purpose under the charter was limited by no express restriction; and the only implied one was, that they would not transcend the fundamental articles or condition of the charter, or violate the declared will of the stockholders, convened at general meetings, duly assembled. Within these limits, the acts or omissions of the Directors, as between them and the officers appointed or employed by them, had precisely the same effect and operation as the acts or omissions of a natural person in respect to agents employed in his private affairs.

The powers of the Directors being thus obvious and extensive, if, from the origin of these transactions, we trace their various proceedings down to the correcting entry made on the 29th of June, 1840, and can no where find on the books, during the long period of more than four years, any specific entry applicable to these very expenses which they (the Directors) knew to have been incurred prior to the first of March,

1836; comparing this striking negative evidence as to the, at least, tacit acquiescence of omission, with the positive evidence of the entry made in 1840, and with that as to the large expenditures intermediately incurred under the head of "Permanent Expenses," it would be unjust in the extreme to seek to visit upon the head of a solitary subordinate officer of the institution the penal consequences (could such attach) of errors, if there were any, in which the Directors, and no inconsiderable portion of the stockholders, must have participated during the season of the supposed prosperity of this unfortunate institution. That the officers, who depended upon this prosperity for their support, should have combined with the intention of destroying it, it is difficult to credit.

The counsel for the prosecution have not undertaken to impute to the Directors the guilt of a treacherous combination with the officers to plunder the stockholders, of whom they were the representatives. Yet it would be next to impossible to sustain this prosecution, except upon grounds which would thus impute a common participation in the guilt of the relators to the Directors, who were their superiors. Of such a fraudulent coalition between the Directors and the officers, there is nothing in the evidence to justify even a reasonable suspicion. But to say this necessarily induces the conclusion that no "*probable cause*" has been shown to bind over these parties for having criminally conspired to cheat and defraud the stockholders, and that they are entitled to be discharged from the custody in which they have been detained.

OPINION

OF THE

HON. ARCHIBALD RANDALL,

JUDGE OF THE COURT OF COMMON PLEAS,

IN THE CASE OF

SAMUEL JAUDON.

Commonwealth ex rel. Samuel Jaudon, *vs.* Joseph H. Wertheym. } *Hab. Corpus.*

The writ in this case having been allowed by me in term time, a motion to quash it was made by the counsel of the prosecution, on the ground, that a single Judge has no authority to award such a writ, except in vacation, but that the application must be to the Court in Bank. Under the acts of 1785 and 1791, this may be so; but in this country it was found necessary to extend the jurisdiction; accordingly, by several acts of Assembly from 1817 until 1832, each of the Judges of the District Court were authorized to issue writs of Habeas Corpus, either *in term* or *vacation;* this authority expired in 1832, when the only authority to issue such writs, in the absence of the Judges of the Supreme Court, was vested in the Judges of the Court of Common Pleas, and the Recorder of the city. No regular record of these writs is kept in the office of the Common Pleas, but there are now in the office, petitions on which one hundred and eighty-eight were allowed in the year 1834, and one hundred and eighty-seven in the year 1835. On the 11th of March, 1836, an act of Assembly was passed, authorizing *each of the Judges* of this Court to hold a Court of Common Pleas, "and to issue writs of Habeas Corpus, and grant relief thereon." It was under this act the writ in this case issued. By the act of 1791, each of the Judges of this Court was authorized to issue writs of Habeas Corpus in vacation—the act of 1836 gave power to issue them at any time. Such has been the uniform construction of the law, and it has never until now been questioned. Any other construction would defeat the object of it, as in this country there is scarcely any vacation, except, perhaps, a few days in the months of July and August. The motion was, therefore, overruled.

The charges against the relator, although divided into several specifications, may be reduced to two:

1. A conspiracy with other officers of the Bank of the United States, fraudulently to take large sums of money from that institution for their individual benefit, without the knowledge of the Directors, and to the prejudice of the stockholders.

2. A conspiracy with others, unlawfully and corruptly, to appropriate to their own use, large sums of money belonging to the Bank, as profits on sundry shipments of cotton made to Europe in the year 1837.

The facts in relation to the first charge, as exhibited in evidence are: That the late Bank of the United States, preparatory to the expiration of its charter, had greatly diminished its discounts and loans, and accumulated a large amount of inactive or unproductive funds. On the 6th of March, 1835, the President submitted to the Board of Directors a general view of the situation of the Bank, its means and liabilities, circulation and deposites, and the probable future demand upon it, when it was "Resolved, That the Committee of Exchange be authorized to make loans on the security of the stock of the Bank, or other approved stock; and, if necessary, at a lower rate than six—not less than five per cent." The Committee of Exchange consisted of three members who met daily at the Bank to receive applications for loans, and were attended by the First Assistant Cashier, through whom their resolutions were carried into effect. If but one member attended, he was authorized to transact the business, reporting his proceedings to his colleagues on the next day. They did not keep regular minutes, nor were their transactions reported to the Board otherwise than as the aggregate amount of their loans appeared under the head of "Bills receivable," on the balance sheet of the state of the Bank, which was laid before the Board of Directors at each meeting. When a loan was authorized, the money was paid, or the amount carried to the credit of the borrower, and the Assistant Cashier gave a ticket or memorandum to the teller, directing him to "charge bills receivable," and "credit cash," with the amount. These tickets were retained by the teller, and counted as cash, until they were regularly entered on the proper books of the Bank to their appropriate account. At times they accumulated in the teller's drawer, but were always entered before the semi-annual counting of cash by the Committee on the State of the Bank.

In 1835, after the passage of the above resolution, an application was made to the Exchange Committee by the Cashiers, Messrs. Jaudon, Andrews, and Cowperthwaite, to ascertain whether that Committee would be willing to loan them a large sum of money on the deposite of stocks as security. The Committee agreed to make the loan, but to what amount does not distinctly appear.

Mr. Bevan, one of the Committee, recollects that at one time the sum was about $300, 000 to the three jointly. Mr. Platt, another member of the Committee, says the sum was a large one, but he does not recollect the amount—that money was abundant, and they were loaning largely to individuals on stock securities—always looking more to the securities

than to the individuals. Mr. Newkirk, the other member, recollects seperate loans to Mr. Jaudon and Mr. Andrews, but does not recollect a joint loan.—Some of the loans appear to have been made to Messrs. Jaudon, Andrews, and Cowperthwaite, on stocks deposited by them jointly, but each charged with one-third of the amount; others were made to each of them separately, but never in any instance without the deposite of collateral security.

On the 1st of January, 1837, Mr. Jaudon's indebtedness, as well on account of separate, as his proportion of the joint loans, appears to have amounted to $410, 934 27, and the securities deposited by him were valued at $413,382. On the 1st of July, 1837, a settlement was had with him by Mr. Folwell, on behalf of the Bank, and resulted in a balance of $408,388 26 due the Bank, for which Mr. Jaudon gave his note of that date, and which note is entered among others in first deposite note book (No. 9871)—the account was afterwards regularly settled on the 1st of January, and 1st July in every year, and the balance gradually reduced until the settlement of the 27th August, 1841, hereafter mentioned. when it amounted to $46,521 11.

That these loans were not at the time known to all the Directors is certain, but that they were conducted in the same way as all other loans made by the Exchange Committee, (and these were to a large amount,) is equally true. That they were entered upon the books of the Bank is apparent from the fact of their having been counted as part of the assets of the Bank by the joint committee appointed to value the assets for the purpose of settling with the United States, after the charter by the State of Pennsylvania, in 1836, and also by a special committee appointed on the 12th Nov. 1839, "to examine into the liabilities and assets of the Bank," who among other debts reported "S. Jaudon securities ample $167,740 84." This report is signed by five of the Directors, and is entered at length on the minutes of the Board—the collaterals deposited as security to this sum were then valued at $266,412.

On the 22d September, 1837, Mr. Jaudon sailed for England, to reside there as agent for the Bank, and remained until July, 1841, when he returned to this country.

In August, 1841, a committee of the Directors applied to Mr. Jaudon to know if he would again go to Europe, as agent of the Bank. He replied, he was willing to do so "on one condition, namely, that he could make a satisfactory arrangement with the Bank in relation to the debt he owed." He proposed to pay one-half in cash within 30 or 40 days, and the balance in two years, secured by stocks remaining at the Bank." This proposition was accepted, and his note given for $14,521 11, payable in two years: the balance was paid in money; and the cashier authorized to transfer such stocks held by the Bank as amounted at par to the money paid, as he might select; and thus this account was settled.

In every instance the debt was reduced by payments in cash or sales of collaterals, of which the proceeds were received by the Bank, except two. On the 19th March, 1838, there appears this entry:—

"By S. J. proportion of the following stocks, taken in part payment of his loan as of Jan. 1:

Danville and Potts, 5's,	70,000
Union Canal,	10,000
3690 sh. P. and R. Railroad,	179,500
	$259,500
1-3 credit of S. J.	$86,500

and on 26th March, 1838, 33 1-3 shares West Feliciana Railroad and Banking Company $3,333 33 was accredited to his account. Messrs. C. & A. received similar credits. What was the value of these stocks at that time does not appear, but had they been credited for more than their true value, I presume it would have been shown; at all events the credits were given when Mr. J. was in Europe, and were ratified by the proper officers of the Bank, and have never been made the subject of complaint by the Board, and with a full knowledge of these credits he was again appointed their agent to Europe, a station he still holds, his resignation not having been accepted by the Board of Directors.

It has been urged by the Counsel who concluded the argument for the Commonwealth that this evidence was sufficient to place the defendant on his trial for a criminal conspiracy to defraud the Bank, but the opening counsel for the prosecution candidly admitted that in his opinion it was too vague and uncertain to justify a binding over—and rightly so. What is a criminal conspiracy? It is—

1. An agreement by two or more persons to commit a criminal act, and in this case the means by which the act is to be committed is immaterial.

2. An agreement to commit an act not criminal in itself, but to be accomplished by criminal means, and there must be a direct intention that injury shall result from it, or the object must be to benefit the conspirators to the prejudice of the public, or the oppression of individuals.

Under which branch of this definition can this charge be placed?

1. It is not criminal to borrow money from a Bank with an intention of repaying it.

2. The means cannot be considered criminal, for the real value of the securities thus offered was known to the committee.

3. Any intention to defraud the Bank is rebutted by the fact, that the securities deposited were always of a greater value than the amount of the loans.

But it has been contended that these loans were unknown to the Directors, and that secrecy is always a badge of fraud—that the mode of obtaining it by tickets is unusual and unaccounted for, and that the money having been obtained under a corrupt agreement the offence was complete, and was not merged by a repayment of the money.

I agree that the unlawful combination is the gist of the offence, and if once proved no subsequent return of the money can release the par-

ties from their liability to prosecution; but does this evidence prove such a combination? Every witness who has been examined on this part of the case says these loans were conducted in precisely the same way as all other loans made by the Exchange Committee. They were all paid or credited on the tickets or memorandums of the Assistant Cashier, carried through the books of the Bank in the same way, and the witnesses knew no difference between the officers of the Bank and other borrowers. The loans made by the Exchange committee amounted to many million of dollars, distributed in various sums among our different merchants and men of business—it is true that it has been principally repaid—but that as to this question is of no importance—the offence consisted in the secret borrowing, and if the doctrine contended for by the prosecution be correct, every man who ever borrowed a dollar from this committee, was guilty of a conspiracy and liable to imprisonment in the penitentiary. To support any criminal charge, there must be an intent to commit crime, either in the object or the means by which the object is to be accomplished. This intent may be gathered from all the circumstances of the particular cases. But I have been unable to discover, in any part of the evidence exhibited in support of this charge, a single fact or circumstance that would justify me in inferring such an intent.

As to the second charge, the evidence is, that in March, 1836, after the Bank had obtained a charter from the State of Pennsylvania, the relator was authorized to proceed to Europe for the purpose of negotiating a loan of a sum of money not exceeding seven millions of dollars for the use of the Bank, and to make arrangements for the Foreign agencies and payment in Europe of dividends upon stock held there. He succeeded in effecting a loan of one million pounds sterling through Messrs. Baring, Brothers & Co., of London, to be repaid by four instalments of 250,000*l.* each on the first of June and first of September, in each of the years 1837 and 1838. And also a loan of 12,500,000 francs through Messrs. Hottinguer & Co. of Paris, payable by instalments on the first of July and first of Oct., 1837, 1838 and 1839, at five per cent. interest. Having accomplished the object of his mission, he returned to this country on the 25th of August, 1836, and resumed his duties as Cashier of the Bank. Early in 1837, it became necessary to provide for the payment of the first instalment of these loans, due in June and July. The Bank had been in the practice of remitting bills drawn here on American Houses in London and Liverpool, and had forwarded such bills to a large amount to Messrs. Baring, Brothers & Co,; but owing to the unexpected failure of these houses, many of the bills were not accepted, but were returned protested. Mr. Bates, of the house of Baring, Brothers & Co., in a letter to the relator, dated 22d May, 1837, says, "I cannot see how you can expect to find safe bills or bills that can be relied upon to place us in funds, as you have seen that nearly all the firms at Liverpool and here are either unable to pay or refuse to accept;" and he recommends shipments on cotton as the only certain mode of remitting, except that of sending specie. But specie could not be pro-

cured, and the bank was by its charter prohibited from dealing in merchandise. Sterling bills of exchange were as high as twenty per cent. and few that were considered safe to be had even at that rate. Under these circumstances Mr. Biddle and the relator authorized Mr. A. G. Jaudon to make large purchases of cotton, both here and in the southern markets, to be shipped to Liverpool and Havre on their own account, they individually agreeing to indemnify him against any loss that might be occasioned by such purchases or shipments. The first shipment under this arrangement appears to have been made about the 22d May, 1837, and was followed by others during that year, until the invoices amounted to nearly two millions of dollars. The object of these shipments was said to be to ensure safe remittances, and Mr. A. G. Jaudon was instructed to leave it optional with the sellers either to consider the money paid as an advance, and the cotton to be sold on their account, or as an absolute sale.

The cotton shipped to Havre, was consigned to the house of Messrs. Hottinguer & Co. whose agent in New York, Mr. Wilder, on receiving the bills of lading, drew on his principals in Paris for an amount sufficient to cover the cost, and these bills were sold to the Bank. The cotton shipped to Liverpool was consigned to the house of Messrs. Baring, Brothers & Co., at that place. Mr. Jaudon applied to Mr. Ward, the New York agent of that house, to make remittances similar to those made by Mr. Wilder, but he declined.

The bills of lading were then deposited in the Banks, forwarded to the London house of Baring, Brothers & Co. with instructions to place the proceeds when sold to the credit of the Bank of the United States, for account of A. G. Jaudon—the correspondence of the Bank was with the London house, that of A. G. Jaudon with the house at Liverpool. When the bills for cotton became due here, that shipped to Havre was paid for by the proceeds of Mr. Wilder's drafts sold to the Bank—that shipped to Liverpool was paid for by advances received from the Bank on deposit of the bills of lading. On the 22d of Sept. 1837, S. Jaudon sailed for England as agent of the Bank of the United States, when the shipments by A. G. Jaudon ceased, and after that time neither of the Jaudons were interested in any other.* On final settlement of the account of A. G. Jaudon with the Bank, there appeared a profit on these shipments of about two per cent. amounting to between forty thousand and fifty thousand dollars, [the exact sum has not been stated] which was equally divided between N. Biddle and S. Jaudon; and it is of this money the relator is charged with having unlawfully conspired to defraud the Bank. A number of the directors and members of the Exchange Committee have been examined, and prove that they did not know of these advances to A. G. Jaudon—advances of precisely a similar nature, were made on shipments of Cotton and Tobacco consigned

* Mr. A. G. J. charged no commission to the parties here, but received a bonification or return commission from the consignees in Havre, and one half the commission on purchases made at New Orleans, and consigned to Liverpool—this was paid by the seller.

to the Foreign Agents of the Bank, [Messrs. Hottinguer & Co. Paris, Baring, Brothers & Co., London, and Hope & Co., Amsterdam,] by other individuals, and these were equally unknown to the Directors. In these advances and those made to Rodgers & Co., Heckenrath & Lownes, Lambert & Thompson, J. M. English, Cazenove, and others, there were no distinction; all were made in the same way, and each was immediately entered in the general ledger to the debit of bills on London, and the aggregate amount prepared semi-weekly in the balance sheet of the state of the Bank under the head of "Foreign Bills of Exchange."

The Directors all knew that the foreign debt was to be provided for, but the Board considered that the duty of the exchange committee, and the committee left it entirely to the judgemnt of the Cashier, without enquiry how or in what manner the remittances were made; all however agree that the mode of advancing on bills of lading was perfectly proper, and a safe and correct mode of doing buisness; but it is said these purchases having been paid for by funds advanced by the Bank, the profits should have been enjoyed by the Bank—so far as the shipments were made to Havre, the advances were made by Mr. Wilder, and his bills of exchange being purchased by the Bank, were equivalent to a payment of so much of its debt to Messrs. Hottinguer—the money for these could have been obtained from other sources without difficulty; and the advances on the Liverpool consignments were not made until after the cotton was shipped, it having been rumored that the shipments to England were on account of the Bank, many of the witnesses (Directors) enquired of the officers of the Bank if it was so, and were uniformly answered that the Bank was not interested in a single bale of cotton, further than having made advances of the bills of lading, and with this answer they were satisfied. Mr. Eyre on one occasion said, if it was shipped on account of the Bank, the officers must know it was contrary to their charter, and if on their own account they must bear the loss if any; and Mr. A. G. Jaudon swears it was the express understanding, that losses, if any, should be borne by S. Jaudon and N. Biddle, and that they were entirely competent to meet it. It is true that it was not known who were the principals of Mr. A. G. Jaudon; but can this make any difference? Suppose they had not been connected with the Bank, would there have been more impropriety in these transactions, than in those with Messrs. Rodgers, Cazenove and others. There is nothing in the charter of this Bank, which prohibits its officers from trading in merchandize. There was nothing inconsistent with their duty as officers of the Bank if that institution sustained no loss by it—on the contrary, it is in evidence that by the terms of settlement with A. G. Jaudon, the Bank, allowing an average exchange of eleven and seven-eighths per cent., when during most of the time the current rate was 14 to 20 per cent., the Bank has gained far more by this operation than has been realized by the defendant.

I agree with the counsel for the Commonwealth, relator, that I am not to decide on the guilt or innocence of the defendant—but I am to de-

eide whether, on the evidenee before me, there is probable cause to place him on trial as a eriminal. The question as to what is the probable cause, was fully and ably discussed before this Court in the case of the Commonwealth vs. Ridgway, 2 Ashmead, 247 : that also was a charge of conspiracy—and on this part of the case the opinions of Judge King and of Judge Jones appear to me to be entirely applicable to the present. "The first element in the correct determination of any proposition submitted to the understanding," says Judge King, "is exactness in the appreeiation of the thing to be determined upon ; it is to the want of clearness in this particular that mueh misunderstanding as to this case is to be attributed. I have said that the testimony either suffieiently establishes a conspiracy to defraud the public through the instrumentality of an unlawful Bank, with a fietitious or exaggerated eapital, or that it altogether fails in fixing any eriminal liability on the defendant. In this view of the matter, what then is the question submitted to us? It is simply and plainly whether the prosecution has shown us sufficient probable cause to satisfy us judicially, that the defendant has fraudulently and corruptly combined and eonfederated with Thomas W. Dyott, to cheat and defraud the citizens through the instrumentality of the Manual Labor Bank. It is not a question whether Thomas W. Dyott has individually been guilty of fraudulent practises, or even whether such an imputation can be fairly charged on J. Ridgway ; but whether, aceording to the evidence adduced before us, these parties have, by pre-eoneert and pre-arrangement, united in a formed design to cheat the public. The vital prineiple of the charge, is the fraudulent and eorrupt eombination between the alledged eonfederates in crime, and this combination the Commonwealth must prove, either by direct evidenee, or through the exhibition of such eircumstances as necessarily tend to its establishment. The erime of criminal conspiracy to cheat and defraud, is a grave one, and may if established, be punished to the extent of seven years in the solitude of a penal cell. Such a erime is therefore not to be charged on any man from circumstances—strained presumption or jealous surmises. Any citizen, be he humble or be he lofty, who has lived a life of unsuspected integrity in the eommunity, has a fair right to require of an examining tribunal, that before he is to be arraigned as a felon at the bar of criminal justice, reasonable preliminary proof of his guilt should be adduced. A mere binding over to answer for a crime, is a thing very flippantly talked of, even by professional men; but eommon sense and observation show that sueh a result never fails, where the charge is infamous, in inflicting an injury on the feelings, and one which is rarely, if ever healed. Every dictate of reason and every impulse of humanity render these principles indisputable."

And Judge Jones, after noticing the nature of the eharge, says :— "Viewing the ease thus our duty is clear. It would undoubtedly be gratifying to some of the weaknesses of human nature, to refer this ease to a Jury, and thus throw off of ourselves the responsibility of a deeision. But we eannot do so without violating our duties and our oaths, and would only be postponing responsibility. When a ease is on trial, it is

our function to define the law; and if the facts proved do not amount to a crime, we must so instruct the jury, and direct an acquittal—if they disregard our direction, we must grant a new trial."

To all that is here said I give my full and entire concurrence, and with this view of my duty I have most anxiously and carefully considered the evidence submitted to me on the part of the prosecution. I am aware that the Supreme Court of the State of New Jersey have decided after an elaborate argument, that on a charge such as this, no indictment can be sustained. In that case there was an indictment against five individuals for a conspiracy to cheat the State Bank at Trenton of a large sum of money by means of checks or drafts, when they had no funds in the Bank. The indictment was quashed on the ground that the Bank was to be considered as an individual, and the indictment would be for such a civil injury—*State vs. Rukey*, et. al. 4 Halstead, 293. This point, however, has not been argued before me, and upon it I give no opinion.

I have for the purposes of this hearing considered the charge as an indictable offence. But I have been unable to find any portion of the evidence which would justify the finding of such an indictment. The evidence before me was confined to the shipments made in 1837, with the others, the defendant had no concern. By those shipments no one was injured; the Bank would not, without risking a forfeiture of its charter, have engaged in them—every dollar advanced by the Bank was repaid with interest, and in the conduct of the defendant I see no just cause for censure. He is therefore discharged.

OPINION

OF THE

HON. ARCHIBALD RANDALL,

JUDGE OF THE COURT OF COMMON PLEAS,

IN THE CASE OF

THOMAS DUNLAP.

Commonwealth et. rit. Thomas Dunlap, vs. John Thompson. } *Habeas Corpus.*

THERE is no difference in the principle, (as to the cotton shipment) between this case and that of Samuel Jaudon. The results in this were, perhaps, more favourable to the Bank, as Messrs. Humphreys and Biddle, at Liverpool, to whom the cotton was consigned, generally made advances to the agent of the Bank of the United States in England, on receiving the bills of lading, and this was before the Bank here was called on to advance a dollar. The profits on the first shipments were ascertained by the difference between the sums paid here, and the amount placed to the credit of the Bank of England; and this, when finally settled, was paid by Mr. Cabot, for Bevan & Humphreys, to the parties interested. The loss on the second shipment was ascertained in the same way, and after having been investigated by a committee of the directors, is reported to the Board to have been *settled*, *liquidated*, and *paid*. This committee of investigation was appointed mainly at the suggestion of Mr. Dunlap, who always asserted the liability of the parties to be charged with this loss, and his own readiness to contribute his proportion of it. His interest in the last shipment was represented by Mr. S. V. S. Wilder, of New York, by whom the shipment was made, and who, it is in evidence, settled with the Bank on the 8th of December, 1840, by the payment in money of $161,793 93, for which he obtained a receipt from Mr. Lardner, the Cashier, stating it to be "in full of principal and interest of one-fourth of balance to debit of account 'Bills on London—advances S. V. S. Wilder,' which amount, with settlements already made, and payments received from other parties responsible for three-fourths of said debt of $631,390 97, *is in full discharge of the said account.*" The shipments were all made to meet the liabilities of the Bank in England, no bills having been drawn for any other account; and so far from the Bank being a loser by these transactions, it is sworn that a large sum of money was saved to it by the ope-

ration. That this was, at the time, the only safe mode of remittance, is in full proof; and it is further evidenced by the fact, that after these shipments had been made, and the results were known, when the bonds given by the Bank for advances made to New York approached maturity, the Exchange Committee with the approbation of some of the Directors, resorted to the same method of remittance (at the risk of the charter,) by authorizing Messrs. Bevan and Humphreys to make shipments of cotton on account of the Bank, and by the guarantee of an agreement made by those gentlemen, on the 17th of October, 1839, (as agents of the Bank,) to ship cotton to the amount of three hundred thousand pounds sterling, to be consigned to Messrs. Huth & Co., at Liverpool, for sale, and the proceeds paid to the London house of Huth & Co., who held collateral securities belonging to the Bank, amounting to upwards of two million of dollars.—On this shipment, however, there was no loss.

A number of receipts, signed by Mr. Dunlap as President of the Bank, for various sums of money received from the Cashier, and directed to be charged to "miscellaneous expenses," have been exhibited in evidence, and these, it is said were given without the authority of the Board of Directors. The direct purpose of these payments does not appear, but the evidence is that the charges were regularly made on the books of the Bank—the aggregate amount entered on the semi-weekly balance, and *that* exhibited to the Board of Directors under the head of "permanent expenses," or "bonus," and the vouchers were exhibited to the special Committee appointed to enquire into the state of the Bank, whose report adopting these payments, was agreed to by the Board—That this account was a subject of examination by the Committee is proved by the fact of their calling for the vouchers. Every facility for the examination was given by the officers of the Bank; and as the Committee deemed it unnecessary to trace these items to their source, their omission to do so cannot be visited on Mr. Dunlap, who, it is in evidence, *never received one dollar of the money*, but gave the receipts as formal vouchers for the Paying Teller; and Mr. T. S. Taylor, Accountant-General of the Bank of the United States, who had charge of this acconnt, says that every dollar went to the use of the Bank of the United States, as he verily believes.

If the receipts were given without authority, and the Bank had suffered by it, there might have been a civil liability for the amount of the loss, but I think the citizens of this country are not prepared to say that *any act* which at the time it is committed creates merely a *civil liability*, can be by subsequent circumstances converted into, and punished as a CRIME.

In the evidence before me, there is nothing to justify the charge of *any offence* against Mr. Dunlap;—consequently he is *discharged.*